

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SUE A. AUSTIN**

Claimant

VS.

**JAYHAWK AREA COUNCIL  
BOY SCOUTS OF AMERICA**

Respondent

AND

**AMERICAN HOME ASSURANCE COMPANY**

Insurance Carrier

Docket No. 1,012,416

**ORDER**

Claimant appeals the December 5, 2008, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was found to have suffered an accidental injury which arose out of and in the course of her employment with respondent on June 14, 2001, when she suffered a shock after being in the parking lot of her building when the building was struck by lightning. Claimant was found to have suffered a 19 percent impairment to her right upper extremity at the level of the forearm and a 2 percent impairment to her right lower extremity.

Claimant appeared by her attorney, Beth Regier Foerster of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew S. Crowley of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at oral argument to the Board, the parties stipulated that , effective January 30, 2002, claimant's fringe benefit package valued at \$508.84 per week should be added to the average weekly wage calculated by the ALJ in the Award. The Board heard oral argument on March 20, 2009.

**ISSUES**

1. Did claimant suffer accidental injuries which arose out of and in the course of her employment with respondent? Respondent argues the injuries suffered by claimant occurred while claimant was doing a favor for a co-worker and not while she was performing work connected with her job. Claimant argues the activity was at the request of a co-worker and cooperation among office workers is of benefit to both the workers and the employer. There is no dispute that claimant was on respondent's premises when the accident occurred.
2. What is the nature and extent of claimant's injuries and disability? Claimant argues the ALJ erred in failing to award a whole body disability and a permanent partial work disability under K.S.A. 44-510e, as board certified physical medicine and rehabilitation specialist Steven Simon, M.D., determined that claimant suffered not only injuries to her extremities, but also to her body and brain as the result of the lightning strike. Respondent argues the opinions of the other health care professionals contained in this record support only impairments to claimant's right upper and lower extremities. Therefore, the Award of the ALJ should be affirmed.

**FINDINGS OF FACT**

On June 14, 2001, claimant was employed as a district executive for respondent. On that day, she was asked by respondent's finance director to go to her car in respondent's parking lot and retrieve a piece of literature. It was raining and claimant initially requested to wait until the rain stopped, but, as the finance director needed the information to complete his phone call, he requested that claimant obtain the information immediately. The finance director did offer claimant his umbrella. As claimant was walking through the parking lot, the building was struck by lightning, and the secondary effect caused claimant to fall to the ground, landing on her hands and knees. It is unclear from this record if claimant was struck directly or in some secondary fashion. Several of the medical reports refer to the strike as a near strike rather than a direct strike. However, none of the doctors involved in claimant's evaluation and treatment dispute that claimant suffered ill effects from this accident.

Claimant was referred to her primary care physician, Ivan Ketter, M.D., seeing him in November 2001, which claimant stated was the first available appointment. At some point, claimant was referred to a cardiologist.

On November 14, 2001, claimant put in a request for a leave of absence in order to get help resolving her neuromotor issues. This request was later denied by respondent. Claimant testified that her physical problems were having an effect on her job and she felt she had no other recourse but to resign her job with respondent, which she did in her letter of December 6, 2001. However the resignation was not effective until January 18, 2002. While claimant argued that her performance had suffered from this accident, her performance reviews leading up to her resignation were sufficiently satisfactory to allow claimant a pay increase. Claimant continued to perform the duties of district executive until that date.

Claimant was referred by her physician to neurologist Parminder Chawla, M.D., for an examination and ultimately treatment, beginning on December 26, 2001. Dr. Chawla diagnosed claimant with tingling in her extremities, headaches, dizziness, fatigue, blurring vision and problems with concentration. At the January 29, 2002, examination, claimant complained of tingling in her extremities and feeling pins and needles in her hands and feet. On August 14, 2002, Dr. Chawla noted a mildly positive Romberg test which is an indication of a very focal peripheral neuropathy and is typical with a lightning-strike-type injury. However, by September 16, 2004, the Romberg test was negative. At the August 14, 2002, visit, Dr. Chawla determined that claimant could return to work without significant problem as claimant's job was primarily sedentary. The return to work restrictions limited claimant to 40 hours per week, less than she was originally working. Dr. Chawla found claimant's musculoskeletal or neurological examinations to be normal, as were the mental and strict examinations and claimant's sensory examination. There was an indication of a slightly less grip strength in claimant's right hand as compared to her left hand. There was no indication of a limited range of motion in claimant's cervical spine. Dr. Chawla answered questions regarding claimant's ability to perform tasks, but ultimately determined that a task loss opinion was more appropriately answered by a rehabilitation physician and deferred to Dr Sankoorikal.

Claimant came under the care of board certified physical medicine and rehabilitation specialist Joseph G. Sankoorikal, M.D., on September 27, 2004. Claimant's initial complaints included her right arm and right leg, with pain in both. Dr. Sankoorikal ordered EMG studies which indicated neuropathy in claimant's median nerve in her right upper extremity, and a minimally prolonged signal involving the sural nerve in claimant's right lower extremity. These EMG findings, when combined with claimant's injury history and complaints, and the involvement of one side of claimant's body were more likely related to the lightning strike. Dr. Sankoorikal ordered a functional capacity evaluation (FCE) which was performed on May 31, 2005. Claimant was found to have fatigue, and her endurance was not up to par, but she was found to be able to function in a medium type of work. The FCE did indicate a decreased toe lift with claimant's right foot when she was fatigued. However, Dr. Sankoorikal's examinations of claimant did not elicit evidence of a foot drag. Claimant's physical examinations were normal in both the upper and lower extremities. Hip

rotation, extremity strength and straight leg raising were all normal. In viewing the task list prepared by vocational expert Dick Santner, Dr. Sankoorikal determined that claimant had lost the ability to perform 2 of 23 tasks for a 9 percent task loss. He rated claimant at 10 percent for her median nerve impairment and 10 percent for the ulnar nerve impairment, both pursuant to the fourth edition of the *AMA Guides*.<sup>1</sup> This calculates to 19 percent, with the parties disputing whether the rating should be to the upper extremity at the upper arm level or to the forearm. Dr. Sankoorikal also rated claimant at 2 percent to the right lower extremity for the sural nerve involvement. Dr. Sankoorikal determined that claimant had reached maximum medical improvement (MMI) on February 18, 2005.

Claimant was referred by respondent to board certified internal medicine and occupational medicine specialist Chris D. Fevurly, M.D., on November 1, 2004. Dr. Fevurly performed a physical examination, finding claimant had a full range of motion in her cervical spine, normal grip strength and a normal ability to toe and heel walk. Grip strength in the right and left hands was equal. He saw no evidence of a foot drop or foot drag during his examination. He did acknowledge that an abnormal EMG could indicate sensory changes in the sural nerve in claimant's right leg. EKGs performed at Saint Francis Hospital and Medical Center emergency room on the date of accident were read as being normal, with normal standard rhythm. Dr. Fevurly rated claimant at 10 percent to the right upper extremity for damage to claimant's median nerve and 2 percent to her right lower extremity for the sural nerve damage, both pursuant to the fourth edition of the *AMA Guides*.<sup>2</sup> He also reviewed Mr. Santner's task list, finding that claimant had lost the ability to perform 2 of 23 tasks for a 9 percent task loss. Dr. Fevurly also performed a mini-mental status examination, asking claimant to do simple arithmetic tests and simple word tests. He acknowledged it was not a thorough mental evaluation. He also agreed that neuropsychological damage could result from an electrical current exposure, but the results of his mini-test indicated claimant suffered no psychological changes from her reported electrical exposure. He noted that if claimant had any such changes, they were subtle and to verify claimant's complaints would require a battery of very complex tests. Dr. Fevurly placed restrictions on claimant, limiting her standing to no more than 8 hours of an 11-hour shift. Claimant was to alternate between sitting and standing, with standing for no longer than 45 minutes at a time. Claimant was to do no heavy lifting, meaning up to 70 pounds, but lifting to 50 pounds was acceptable. Claimant was able to work full time within those restrictions.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Steven Simon, M.D., for an evaluation on January 4, 2005. In his evaluation of claimant, Dr. Simon determined that claimant had suffered an injury

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> *AMA Guides* (4th ed.).

affecting her brain and entire right side of her body. Dr. Simon reviewed the EMG report and noted abnormalities involving the median nerve in claimant's right arm, as well as the sural nerve in claimant's right leg. He stated the sural nerve was one of the more likely nerves to be injured in a "near lightning type strike".<sup>3</sup> Claimant's Romberg test was negative. A positive Romberg test, which looks at the cerebellar balance system, would indicate a very focal peripheral neuropathy suggestive of a lightning type strike. He found claimant's reflexes to be brisk on the right side as compared to her left side. He also performed a mini mental examination, with claimant presenting abnormalities in her abstract thinking. When asked to explain, he compared the abstract thinking test results to claimant not being able to understand the "concept of the planets revolving around the sun".<sup>4</sup> Dr. Simon did not perform an MMPI or any other psychological tests on claimant.

In comparing claimant's right and left side grip strength, Dr. Simon found significant defects from the right hand to the left, with the left hand almost 50 percent greater than the right. Claimant also displayed a limited range of motion in her cervical spine. Dr. Simon rated claimant at 39 percent to the whole body, with an additional 5 percent whole body impairment from the results of the FCE, which would raise the total impairment to 43 percent to the whole body resulting from this incident. This rating, in Dr. Simon's opinion, would not include any neuropsychological deficit. The rating included a 5 percent lower extremity impairment for lower extremity nerve deficits (2 percent whole body), 20 percent to the right upper extremity for loss of grip strength (12 percent whole body), 5 percent whole body impairment for pain, 12 percent whole body for mental impairment, 2 percent whole body for cervical range of motion deficits (two ranges each worth 2 percent), and 20 percent to the right upper extremity for median nerve impairment (12 percent whole body). In reviewing the task list created by Mr. Santner, Dr. Simon determined that claimant had lost the ability to perform 13 of 23 tasks for a 56 percent task loss.

Claimant submitted her resignation on December 6, 2001, to be effective January 18, 2002. Her November 14, 2001, request for a leave of absence specifically discusses the lightning incident of June 14, 2001.<sup>5</sup> Her resignation letter discusses her family, her health and new endeavors, but does not specify the lightning incident. After leaving respondent's employment, claimant did not look for any job until being contacted by respondent in May 2002. At that time, she was offered a camp coordinator position on a temporary basis. That employment contract lasted until August 2002. Claimant was again unemployed and again sought no job until being contacted by respondent a second

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<sup>3</sup> Simon Depo. at 14.

<sup>4</sup> Simon Depo. at 46.

<sup>5</sup> R.H. Trans., Cl. Ex. 5.

time regarding a customer service position, although the title changed to scout shop manager at some point. Claimant accepted that position in October 2002 and continued at that job as of the regular hearing on July 24, 2008. Claimant alleges that she was denied fringe benefits until January 2008, but Exhibit 2 to Pamela Underwood's deposition is a document dated October 1, 2002, signed by claimant, wherein claimant declined medical coverage through respondent's employment.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>6</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>7</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>8</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>9</sup>

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<sup>6</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>7</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>8</sup> K.S.A. 44-501(a).

<sup>9</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 44-508(d) defines “accident” as,

. . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.<sup>10</sup>

Injury or personal injury has been defined to mean,

. . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.<sup>11</sup>

The ALJ found the circumstances leading up to this accident to have occurred out of and in the course of claimant’s employment with respondent. The accident itself occurred on respondent’s premises while claimant was assisting a co-worker. The ALJ held respondent’s argument, that claimant was under no obligation to perform the task of going into respondent’s parking lot to get some material needed by respondent’s finance director, to be without merit. The Board agrees. Cooperation among co-workers is necessary for the day-to-day operation of any business. That spirit benefits not only the workers, but also the employer. The incident, where claimant was injured while near a lightning strike on respondent’s building, constitutes an accident which arose out of and in the course of her employment with respondent. Whether it was a direct strike or a near strike is irrelevant.

K.S.A. 44-510d(a)(12)(13)(23) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and

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<sup>10</sup> K.S.A. 44-508(d).

<sup>11</sup> K.S.A. 44-508(e).

amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

...

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510d(b) states:

Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

Claimant's impairment is limited by three health care professionals to include her right upper extremity and her right lower extremity. Only Dr. Simon includes claimant's cervical spine, gait impairment, nerve deficits, pain and mental status in his significantly higher rating. The ALJ found Dr. Sankoorikal, claimant's treating physician, to have the best insight into the total damage rendered by this accident. In so concluding, the ALJ limited claimant's award to her right upper and right lower extremities. The Board agrees with this determination.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>12</sup>

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<sup>12</sup> K.S.A. 44-510e(a).



The ALJ also determined that Dr. Sankoorikal had the most insight into the extent of impairment suffered by claimant. Again, the Board agrees with the ALJ. Claimant suffered injuries to her right upper extremity and right lower extremity, with two physicians finding a 2 percent impairment to the right lower extremity. The Board adopts the ratings of Dr. Sankoorikal and Dr. Fevurly as the most persuasive. The Award was calculated to the right lower leg. This portion of the award was not disputed and will, therefore, be affirmed. The ALJ, in awarding claimant a 19 percent impairment to her right upper extremity, calculated the award based on the forearm. Claimant objects, arguing that the calculation should be to the entire arm under K.S.A. 44-510d.

K.A.R. 51-7-8(c)(4) states:

An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

Claimant testified to problems in her right upper extremity. She did not limit her symptoms to below the elbow for these symptoms. Additionally, the EMG/NCT study tested the right arm both at and below the elbow. The high normal EMG value goes from the elbow down the arm and does involve the elbow. As an involvement into a joint causes the impairment to go to the next higher schedule, the impairment is found to encompass the upper arm as well. It is the situs of the resulting disability, not the situs of the trauma, which determines the benefits available under the Kansas Workers Compensation Act.<sup>13</sup> The award of the ALJ will be corrected accordingly. Claimant is awarded a 19 percent functional impairment to her right upper extremity at the level of the arm.

The ALJ utilized an average weekly wage of \$684.30 in calculating the award. The parties stipulated to the Board that, as of January 30, 2002, an additional \$508.84 should be added to the average weekly wage for the fringe benefits lost to claimant at her termination from respondent. This calculates to an average weekly wage of \$1,193.14. As the maximum weekly benefit for a date of accident on June 14, 2001, is \$401.00, as computed under K.S.A. 44-510c and K.S.A. 44-511, the addition of the extra fringe benefit amount into the wage for the calculation of a scheduled injury under K.S.A. 44-510d creates no difference in the award. While this compensation could prove beneficial to claimant were the award calculated under K.S.A. 44-510e, such is not the case here. This fact also renders moot any dispute involving claimant's waiver of fringe benefits as of October 1, 2002.

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<sup>13</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

### CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to calculate a gross pre-injury average weekly wage of \$1,193.14 and an award to claimant's right upper extremity at the level of the arm of 19 percent. The award is affirmed in all other regards.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated December 5, 2008, should be, and is hereby, modified to calculate the right upper extremity award at the level of the arm and not the forearm, and to show an average weekly wage of \$1,193.14, but is affirmed in all other regards.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Sue A. Austin, and against the respondent, Jayhawk Area Council Boy Scouts of America, and its insurance carrier, American Home Assurance Company, for an accidental injury which occurred on June 14, 2001, and based upon an average weekly wage of \$1,193.14.

#### **Right Upper Extremity**

The claimant is entitled to 39.90 weeks permanent partial disability compensation at the rate of \$401.00 per week in the amount of \$15,999.90 for a 19 percent loss of use of the right arm. As of the date of this award, this entire amount is due and ordered paid in one lump sum, minus any amounts already paid.

#### **Right Lower Extremity**

The claimant is entitled to 3.80 weeks permanent partial disability compensation at the rate of \$401.00 per week in the amount of \$1,523.80 for a 2 percent loss of use of the right lower leg. As of the date of this award, this entire amount is due and ordered paid in one lump sum, minus any amounts already paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Attorney for Claimant  
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier  
Rebecca A. Sanders, Administrative Law Judge